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Supreme Court of the United States

OCTOBER TERM, 1948

No.

WILLIAM J. MINSCH, ET AL, INTERVENORS, RAILWAY AND LIGHT SECURITIES COMPANY; THE MASSACHUSETTS GENERAL HOSPITAL; AND BOND INVESTMENT TRUST OF AMERICA, INTERVENORS,

Petitioners,

v.

FRANK BAILEY, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To The Honorable Chief Justice of The United States and Associate Justices of The Supreme Court of the United States.

Your petitioners, William J. Minsch, G. L. Boveroux, Edwin F. Hannon and John D. Talmage, as they are a Protective Committee for the holders of Shareholders' Debentures of Aldred Investment Trust and Railway and Light Securities Company, The Massachusetts General Hospital and Bond Investment Trust of America, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered on June 24, 1948 pursuant to an opinion rendered June 24, 1948 reversing an order of the United States District Court for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court is reported as *Securities and Exchange Commission* v. *Aldred Investment Trust, et al,* in 76 F. Supp. 614 (1948). The opinion of the Circuit Court of Appeals is reported as *Bailey* v. *Minsch,* 168 F. 2d 635 (1948). The opinions of the District Court and the Circuit Court are found at pages 15 and 40 respectively of the record.

JURISDICTION

The Circuit Court of Appeals entered its judgment on June 24, 1948, pursuant to an opinion rendered June 24, 1948. Jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

STATEMENT OF THE MATTERS INVOLVED

The Aldred Investment Trust was organized in 1927 as a Massachusetts Common Law Trust and registered with the Securities and Exchange Commission as a closed end non-diversified management investment company. The Trust issued a number of its 4½% Debentures becoming due in 1967. To each $1,000 Debenture 10 shares of common stock without par value were attached, and in addition there were 112,500 common shares outstanding unattached to Debentures and commonly referred to as "free stock". From 1937 the assets of the Trust were less than its outstanding Debentures, and its earnings did not equal its interest requirements. In 1944 $5,900,000 of the Debentures were outstanding. In that year the Securities and Exchange Commission brought proceedings against the Trust and its Trustees and officers to enjoin the management from acting as such because of gross misconduct and gross abuse of trust. The complaint also asked the appointment of Receivers with the usual powers of Receivers in equity to take over and hold all of the property of the Trust. After

a trial on the merits, the District Judge found the Trustees and officers (with one exception) guilty of gross misconduct and gross abuse of trust within the meaning of the Investment Company Act of 1940, 54 Stat. 841, 15 U. S. C., Section 80a-35 and enjoined them from acting as Trustees or officers. Receivers were appointed to reorganize or liquidate the Trust. *Securities and Exchange Commission* v. *Aldred Investment Trust,* 58 F. Supp. 724, Aff'd. 151 F. 2d 254 (1945), cert. denied 326 U. S. 795 (1946).

Subsequent to the decision of the Circuit Court of Appeals and while petition for certiorari was pending in this Court, the present respondents, Frank Bailey, et al, acquired 110,000 of the free shares from one of the officers who had been found guilty of gross misconduct and gross abuse of trust. The respondents were allowed to intervene in the Receivership proceedings and sought a termination of the Receivership and a continuation of the Trust. Some of the present petitioners, namely, Minsch, et al, were allowed to intervene as a Protective Committee for the Holders of Shareholders Debentures on April 26, 1946. As a result of the appreciation in value of certain of the securities in the portfolio of the Trust the Trust became solvent some time in the year 1945. Plans of reorganization were filed by the petitioners, Minsch, et al, by the respondents and by others. On June 19, 1946 the District Court disapproved all of the proposed plans of reorganization, denied the prayer of the respondents for termination of the Receivership and ordered the Receivers to liquidate the Trust. That order was affirmed by the Circuit Court of Appeals for the First Circuit, *Bailey* v. *Proctor,* 160 F. 2d 78 (1947) and certiorari was denied by this Court, 331 U. S. 834 (1947).

On June 19, 1947 the District Court granted a motion of the petitioners, Minsch, et al, for payment of the Debentures at their face amount, together with accrued interest and for the separation of the 59,000 attached common

shares and their distribution to the Debenture holders. (R. p. 29) Substantially all of the Debentures have been surrendered to the Receivers. The petitioners, Minsch, et al, asked payment of a premium in reliance upon Section 10 of the Debenture Agreement, which reads as follows:— (R. p. 15)

> "The debentures issued hereunder are subject to redemption at the option of Aldred Investment Trust on any interest payment date prior to Maturity, as a whole, but not in part, at the principal amount thereof and accrued interest thereon to the date fixed for redemption, together with a premium of 7% of the principal thereof if redeemed on or before December 1, 1937 and if redeemed after December 1, 1937 together with a premium of 7% of the principal amount thereof less 1% for each full five year period elapsed since December 2, 1932."

The order of the District Court of June 19, 1947 provided substantially as follows:— (R. pp. 29, 30)

> a. The receivers pay all of the outstanding Shareholders' Debentures at the face amount thereof as of July 1, 1947 plus interest accrued thereon through June 30, 1947.
>
> b. On and after July 1, 1947 interest shall cease to accrue.
>
> c. Upon surrender and payment of the Shareholders' Debentures, the receivers cancel said debentures and issue as of the close of business June 30, 1947 new certificates representing the common stock attached to said debentures.
>
> d. From and after July 1, 1947, the Shareholders' Debentures and the holders thereof have the right only to the payment of the face amount plus interest and plus such amounts
>
> 'as may hereafter be determined by this Court pursuant to Section 10 of the Debenture Agreement securing said Shareholders' Debentures.'

On the same date the District Court denied a motion of the petitioners, Minsch, et al, for the allowance of a premium of 5% on the Debentures. (R. p. 31)

At the time of the entry of the June 19, 1947 order of the District Court denying payment of the bond premium the order for liquidation of the Trust was outstanding and the order denying payment of the bond premium was predicated upon the assumption that the Trust would be fully liquidated. (R. pp. 15, 16)

On October 20, 1947 long after the entry of the order for the payment of the Debentures the respondents, Frank Bailey, et al, petitioned the District Court for a modification of the liquidation order of June 19, 1946. (R. p. 16) This motion requested that upon completion by the Receivers of the payment of all outstanding Debentures the Receivership be terminated, and the management and control restored to the stockholders, providing that shareholders who desired to retain their stock would be allowed to continue the Trust and elect Trustees to manage and operate it. Stockholders who wished to withdraw were to be allowed to do so and be paid the liquidating value of their stock. The District Court denied the motion but the Circuit Court of Appeals reversed the District Court on the ground that it had abused its discretion and held that the motion of the present respondents should have been allowed. *Bailey* v. *Proctor,* 166 F. 2d 392 (1948). The decision of the Circuit Court of Appeals expressly left open the question of whether the Debenture holders under the changed circumstances would be entitled to the premium. The petitioners, Minsch, et al, promptly filed with the District Court a motion for an order for payment of a 5% premium on the Shareholders Debentures. (R. p. 1) The petitioners, Railway and Light Securities Company, et al, were allowed to intervene and on March 22, 1948 the Court ordered the payment of the premium of 5%. (R. pp. 13, 14) *Securities and Exchange Commission* v. *Aldred In-*

vestment Trust, et al, 76 F. Supp. 614 (1948). On appeal to the Circuit Court of Appeals for the First Circuit by the present respondents, Bailey, et al, the order of the District Court was reversed in an opinion dated June 24, 1948. This opinion is officially reported as *Bailey* v. *Minsch,* 168 F. 2d 635 (1948), and is also printed in full in the record.

QUESTIONS PRESENTED

1. May a Circuit Court of Appeals reverse the determination of a District Court as to the fairness of a feature of a plan of reorganization in an equity receivership where no abuse of discretion is shown?

2. May a Circuit Court of Appeals apply to an equity reorganization of an investment trust doctrines and principles developed in reorganizations of public utility holding companies under the Public Utility Holding Company Act?

SUMMARY OF REASONS FOR REVIEW BY THIS COURT

The decision of the court below is in conflict with decisions of other circuit courts of appeal and with decisions of this Court on the same matter, and in addition the court below has decided a federal question of substance not heretofore determined by this Court.

1. The decision of the court below is in conflict with decisions of other Circuit Courts of Appeal and with decisions of this Court in that it held that in receivership proceedings a Circuit Court of Appeals may over-rule the determination of a District Court as to the fairness and equity of a reorganization when no abuse of discretion by the District Court is shown.

2. The court below has decided a federal question of substance not heretofore determined by this Court in that the

court below applied the reasoning of certain decisions under the Public Utility Holding Company Act to an equity receivership. Those cases under the Public Utility Holding Company Act involve a Congressional policy with respect to a limited class of corporations or trusts, i.e., those engaged in the business of owning or operating public utilities as defined in the Act. Unless reversed by this Court the decision of the court below will constitute a precedent that decisions relating to a Congressional policy directed toward a specific and limited class of corporations or trusts are applicable to all corporations or trusts in reorganization through receivership proceedings or otherwise.

I.

IN RECEIVERSHIP PROCEEDINGS THE DETERMINATION OF A DISTRICT COURT AS TO THE FAIRNESS AND EQUITY OF A PLAN OF REORGANIZATION IS FINAL IN THE ABSENCE OF ABUSE OF DISCRETION

In the instant case it is clear that the Aldred Investment Trust is being reorganized through an equitable receivership and as has been recognized by the Circuit Court of Appeals in the instant case the result of such a reorganization must be fair and equitable (R. p. 42). It has been decided many times that in an equity reorganization the approval or disapproval of a plan of reorganization is a matter for the discretion of the trial court in order to bring about a fair distribution of the assets of the corporation or trust under reorganization.

Guaranty Trust Co. v. *Missouri Pacific Railway Co.*, 238 F. 812 (1916)

Guaranty Trust Co. v. *Williamsport Wire Rope Co.*, 14 F. Supp. 871 (1936)

Chase National Bank v. *Wabash Railway Co.*, 40 F. Supp. 859 (1941)

More important this Court in *Group of Institutional Investors et al* v. *Chicago, Milwaukee, St. Paul & Pacific Rail-*

road Co., 318 U. S. 523 (1943) has similarly limited the scope of review by a circuit court of appeals in reorganization matters to whether or not the district court has exceeded the limits of discretion. In this case this Court said in commenting on the fairness of affirming or disaffirming a lease as a part of the reorganization plan, at page 551:

> "Certainly there was ample evidence warranting the conclusion of the Commission and the District Court that affirmance of the lease would be unjust from the viewpoint of other creditors. And we could not say that the Commission, exercising its expert judgment, and the District Court, affirming that judgment, were too generous in the offer which is made to the Terre Haute bondholders or that they should have rejected the lease. We are not warranted in upsetting those determinations on review except on a clear showing that the limits of discretion have been exceeded. We cannot say that here."

And, speaking of the District Court's determination that principles of priority had been satisfied, this Court said at page 564:

> "Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under § 77 (e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

See also *Ecker* v. *Western Pacific Railroad Corp. et al*, 318 U. S. 448 (1943). Although these cases arose under Section 77 of the Bankruptcy Act, principles of equity reorganizations are applicable.

Several plans for the reorganization of this Trust have been from time to time proposed to the District Court (R.

p. 41) and all were rejected, including the present plan proposed by the holders of a majority of the common stock of the Trust. The Circuit Court of Appeals found, however, that the District Court abused its discretion in rejecting the present plan and directed the District Court to allow the Trust to continue. (*Bailey* v. *Proctor,* 166 F. 2d 392) Under the circumstances of this case, it is for the District Court to determine the fairness and equity of the plan insofar as the claims of creditors and stockholders are concerned. Even though the Circuit Court of Appeals conceded (R. p. 43) that "the fairness of a plan is a question for the discretion of the district court" it nevertheless reversed the order of the District Court for the payment of the bond premium and thus, contrary to well-established precedent, substituted its judgment as to the fairness of the plan for that of the District Court. *Scherck, Richter Co.* v. *Dysart,* 123 F. 2d 364, (1941) cert. den. 315 U. S. 818 (1942). It is further respectfully submitted that this decision, review of which is sought, is contrary to the same court's earlier decision in *Bailey* v. *Proctor,* 160 F. 2d 78, cert. den., 331 U. S. 834 (1947).

This case is not limited to a technical question of contract law and the proper interpretation of the trust indenture. It involves a decision as to what is a fair and equitable distribution of the assets of Aldred Investment Trust between two groups of contesting security holders. It is a question of what form of reorganization should be adopted and therefore is within the discretion of the district court. This order of the district court should not be revised on appeal except where there has been an abuse of discretion.

Scherck, Richter Co. v. *Dysart,* supra

Warner Bros. Pictures, Inc. v. *Lawton-Byrne-Bruner Ins. Agency Co.,* 79 F. 2d 804 (1935)

Kansas City Terminal Railway Company v. *Central Union Trust Co.* 28 F. 2d 177 (1928) cert. den., 278 U. S. 655 (1929)

In the *Kansas City Terminal Railway Company* case, supra, in speaking of the power of a district court as to the approval of a plan of reorganization in an equity receivership and the extent to which it would be reviewed on appeal, the court said at page 184:

> "At the threshold of such a test in this case, we are met by a preliminary contention respecting the burden of proof as to such 'fairness'. Wherever that burden may lie in the trial court, there is no doubt concerning it in this court. It is firmly established that when a matter is committed to the sound discretion of a chancellor, his determination thereon will not be set aside unless clearly shown to be erroneous. The wisdom of this rule is accentuated where the matter involved is the reorganization of an insolvent property in receivership under the chancellor approving or disapproving the plan of reorganization. The administration of an insolvent operating property during receivership is so largely a practical business matter that the chancellor gains an experience and insight into the property, its condition, its needs and the relative attitude of interested parties which can never, in its entirety, be transmitted to the printed record. From this intimate association with the property must necessarily come no inconsiderable portion of the 'informed discretion concerning the practical adjustment' of the chancellor."

In Re Irving-Austin Bldg. Corporation, 96 F. 2d 905 (1938) the Circuit Court was asked to upset the approval of a plan or reorganization by the district court. In refusing to upset the plan the Court said at page 906:

> "The report was confirmed by the court, which found as a fact that the plan was fair and equitable, did not discriminate unfairly against any class of creditors, and was proposed in good faith. In such cases we may revise the ruling of the court below only in matters of law. In the absence of the evidence *we must accept the findings of the District Court;* we have no right to say that there was no evidence to support them.

> In re 620 Church St. Bldg. Corp., 299 U. S. 24, 57 S. Ct. 88, 81 L. Ed. 16; Farlee & Co. v. Springfield-South Main Realty Co., 1 Cir., 86 F. 2d 931." (emphasis supplied)

In *Otis* v. *Securities and Exchange Commission,* 323 U. S. 624 (1945), in considering whether or not the Public Utility Holding Company Act matures securities issued prior to the Act, this Court said at page 638:

> "... Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume that Congress intended to exercise its power with the least possible harm to citizens."

In the instant case, the District Judge points out that equity and good conscience required the trustees of this Trust under the circumstances existing when suit was brought to call the Debentures (R. p. 17) but that in order to increase their own personal profits, the Trustees did not. (R. p. 17 - 18). The District Judge then goes on to say:

> "... then the Court's order of liquidation of the debentures should be interpreted as the act of those who were appointed to exercise properly the option to redeem in place of the former trustees who would not." (R. p. 19)

The District Judge, who is familiar with all of the many ramifications of a long and complicated reorganization, is the person best suited to determine what the respective equities are and what should be done in connection with the reorganization. Except where this determination amounts to an abuse of discretion, it should not be upset by a reviewing court.

The decision of the Circuit Court of Appeals, of which review is now asked, contains no finding that the District

Court in ordering payment of a bond premium was guilty of an abuse of discretion, nor can any such inference be drawn from the opinion. On the contrary, the Circuit Court of Appeals set aside the decision of the District Court because the Circuit Court of Appeals disagreed with the findings of the District Court made by the District Court in the exercise of its discretion, which discretion was in no way abused. Thus, the instant decision of the Circuit Court of Appeals is in conflict with numerous decisions of other Circuit Courts of Appeal, which have been cited herein, as well as with its own decision in *Bailey* v. *Proctor*, 160 F. 2d 78, and with decisions of this Court. It is respectfully urged, therefore, that this Court should review the decision of the Circuit Court of Appeals in order to resolve the conflict between the instant decision and those of other Circuit Courts of Appeal and of this Court reaching results directly opposed to this decision.

II.

THE DECISION BELOW, APPLYING DECISIONS UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT TO AN EQUITY RECEIVERSHIP, RAISES AN IMPORTANT FEDERAL QUESTION

The court below relies upon decisions under the Public Utility Holding Company Act to justify its reversal of the order of the District Court. The opinion of the Circuit Court states:—

> "We find persuasive support for our position in cases arising under the Public Utility Holding Company Act in which bonds were prematurely retired in simplification proceedings." *Bailey* v. *Minsch*, supra, page 637 (R. p. 44)

The Circuit Court cites no authority to justify carrying over into the field of equity receivership a doctrine which has developed as an incident to reorganizations under

the Public Utility Holding Company Act. Whether the doctrines which are developed under the Public Utility Holding Company Act should be carried over into equity receiverships is an important federal question which has not been but should be decided by this Court. That the doctrine enunciated by the court below with reference to premiums is peculiar to cases arising out of the Public Utility Holding Company Act and a concomitant of the Congressional policy enunciated in that Act is evident from the language of the Circuit Court of Appeals for the Eighth Circuit in *Massachusetts Mutual Life Insurance Company* v. *Securities and Exchange Commission et al,* 151 F. 2d 424 (1945) where the court says with reference to a claim for premiums at page 430:

> "When the retirement of bonds is compelled by an Act of Congress in the furtherance of a legitimate public policy, contract provisions standing in the way of the consummation of that policy must yield to the public good and are illegal."

Similarly, in *New York Trust Company* v. *Securities and Exchange Commission,* 131 F. 2d 274 (1942) the court, in justifying the refusal to pay a premium, said at page 276:

> "This is especially true where, as here, the essential existence of one of the parties to a contract has become illegal and impossible because contrary to a new concept of public policy which was unforeseeable when the contract was made."

It seems clear, then, that cases arising under the Public Utility Holding Company Act afford no justification for applying to equity receiverships the doctrine of denying payment of the premium which has developed in most of those cases and the action of the court below in carrying over this doctrine into an ordinary equity receivership results in the application to an investment trust of a rule developed under a statute relating to public utility holding companies. It raises an important question of federal

law which should be decided by this Court as to whether or not a doctrine developed in the application of a Congressional act directed toward a specific and limited class of corporations should be applicable to equity receiverships in general.

The attention of the Court is called to the case of *In Re Engineers Public Service Company,* 168 F. 2d 722 (1948). This is a case arising under the Public Utility Holding Company Act in which the Securities and Exchange Commission approved a plan of reorganization giving a premium to preferred stockholders. The District Court, reviewing the plan, upset this feature of it and ordered payment to preferred stockholders at par without premium.

These petitioners are advised that a petition for certiorari is now pending in this Court from the above decision under the name and style of *Home Insurance Company et al* v. *Central Illinois Securities Corporation et al* and docketed as Case No. 243 of the October 1948 term. That case concerns the respective functions of the Securities and Exchange Commission and the District Court in approving a plan of reorganization under the Public Utility Holding Company Act. This case concerns the respective functions of the District Court and the Circuit Court of Appeals in an equity reorganization. Both present important federal questions involving the extent and scope of review by the District Court in one instance and the Circuit Court in the other. Both also involve the same underlying question which has arisen several times under the Public Utility Holding Company Act but never in equity reorganizations so far as the investigations of these petitioners have been able to disclose, and that question is whether or not a District Court may order a premium to be paid in connection with the retirement of outstanding securities by a solvent concern in receivership. This, in and of itself, presents an important question which should be decided by this Court.

III.

CONCLUSION

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit to the end that the case may be reviewed and determined by this Court; that the order and judgment of the Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may seem proper.

Respectfully submitted,

WILLIAM J. MINSCH ET AL

By ROBERT H. DAVISON

LEWIS L. WADSWORTH, JR.
Attorneys, 15 State Street, Boston

RAILWAY AND LIGHT SECURITIES CO. ET AL

By CHARLES B. RUGG
Attorney, 50 Federal Street, Boston

HAUSSERMANN, DAVISON & SHATTUCK
CHARLES C. CABOT
ROPES, GRAY, BEST, COOLIDGE & RUGG
Of Counsel

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